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Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment

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TIPPING THE SCALES: COURTS STRUGGLE TO STRIKE A BALANCE BETWEEN THE PUBLIC DISCLOSURE OF PRIVATE FACTS TORT AND THE FIRST AMENDMENT

I. INTRODUCTION

Over the last one hundred years, courts have struggled to reconcile the competing interests of an individual's right to vindicate personal privacy[1] via the public disclosure of private facts tort[2] and the press's First Amendment[3] right to publish truthful information.[4] This constitutional clash has grown both in severity and frequency[5] over the last few decades[6] as

1. There is no fixed definition for the right of privacy. Some scholars argue that the right of privacy is the right to be let alone. Others argue that the right of privacy is "the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others." Oscar M. Ruebhausen & Orville G. Brim, *Privacy and Behavioral Research,* 65 COLUM. L. REV. 1184, 1189 (1965).

2. Some states have recognized a right to privacy as a derivative of the common law. Other states have recognized a statutory right of privacy. Some states such as California have recognized both a common law and statutory right of privacy. Other states such as Texas, Wisconsin, North Carolina, and Rhode Island have recognized neither a common law claim of privacy nor a statutory right of privacy.

3. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

4. The public disclosure of private facts tort forces courts to engage in the difficult task of balancing the First Amendment's protection of freedom of the press and the interest of the states in protecting the privacy of individuals. On the one hand, there is the plaintiff's right to privacy. This is a right that is becoming increasingly more susceptible to invasion and that should probably be given extended protection. On the other hand, there is the public's right to have information that will assist it in coping with the exigencies of the times. Indeed, one of the predominant purposes of the First Amendment is to foster an informed and enlightened public opinion through preservation of an untrammeled press. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936).

5. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY 151-52 (1995).

> Media coverage once focused on a small group of very famous people, while average Americans watched from the sidelines. But in recent years the "information age" has burst into the information

more and more citizens have grown intolerant of media publishers who consistently sacrifice individual privacy rights for commercial profits.[7] Statistics have shown that the American public has become increasingly disenchanted with the media's persistent stretching of the First Amendment over the last few decades.[8] But perhaps what is even more indicative of the extent to which the press has tread upon personal privacy rights is the fact that journalists from within the media profession have been calling for changes in journalistic ethics and professionalism for quite some time.[9]

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explosion . . . . As a consequence, people who in another time would have lived their lives in quiet obscurity now find themselves in the spotlight.

Id. "America is in the midst of an explosion of litigation aimed against the media. Americans who feel that their reputations have been impugned or their privacy invaded by the broadcast or print media have increasingly resorted to litigation for vindication." RODNEY A. SMOLLA, SUING THE PRESS 4-5 (1986).

6. During the 1960s, the Supreme Court set the stage for a collision of constitutional dimension. At roughly the same time the Court broadened protection for false speech in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court also expressed an interest in protecting individual privacy, in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. One of the more striking examples of the media's overzealous prying into private matters was Princess Diana's death in August of 1997. Hounded for most of her adult life by a crazed press that mercilessly pried into her private affairs, Diana ultimately died as a result of the press's onslaught. Ironically, one week before Diana's death, TIME magazine ran a lead story in its publication focusing on the fleeting right of privacy within the United States. The author stated

> [f]or the longest time, I couldn't get worked up about privacy: my right to it; how its dying; how we're headed for an even more wired, under-regulated, over-intrusive, privacy deprived planet . . . [but] it struck me that our privacy-mine and yours-has already disappeared, not in one Big Brotherly Blitzkrieg but in Little Brotherly moments, bit by bit. . . . We need new legal protections.

Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997, at 30-32.

8. According to a national survey conducted in December 1996 by the Center of Media and Public Affairs, a nonprofit research organization, 52% of Americans said they believe the news media abuses the First Amendment's guarantee of freedom of the press. Substantial numbers in the survey also described journalists as arrogant and cynical. *See Professional Soul-Searching Proposed by Journalists*, S.F. CHRON., Sep. 6, 1997, at A8. "Today, perhaps more than ever, Americans just don't trust the press. . . . Seven in ten Americans [ ] believe that the nation's most influential papers are biased. And this statistical portrait reveals only part of the national mood." *Public Opinion Poll; the Media on Trial*, NEWSWEEK, Oct. 22, 1984.

9. Alarmed by the troubled state of the journalism profession, a group of prominent journalists has called for a major re-examination of what they do, how they do it, and why. Chaired by Bill Kovach of the Nieman Foundation, the Committee of Concerned Journalists has scheduled a series of eight forums to

Generally, despite increasing public disenchantment with the tactics and coverage of the media, courts have often struck the balance of constitutional rights in favor of the right to publish.[10] In large part, this has occurred because of a broad judicial reading of the First Amendment's scope of protection for free speech.[11] As a result, the common law

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address subjects including the purpose of journalism, its role as a neutral observer, and its preoccupation with crime and scandal. According to Tom Rosenstiel, Vice Chairman of the Committee:

> If you were going to say what prompts an effort like this, it's not only that the public is increasingly angry that we have a breach of faith with the public, but in a sense this is a group of very prominent journalists saying "We agree, we share many of the concerns of the public about what we're doing."

Professional Soul-Searching Proposed by Journalists, S.F. CHRON., Sep. 6, 1997, at A8.

10. This area of the law is especially troublesome for courts because they are asked to impose liability upon defendants that publish accurate and truthful information. Unlike the law of defamation, where the press is sanctioned for the publication of false information that clearly falls outside the scope of the First Amendment, public disclosure of private facts tort cases force courts to distinguish between those truthful publications that are protected by the First Amendment and those that are not. *See* Clark v. American Broad. Co., 684 F.2d 1208 (6th Cir. 1982) (holding defendant liable for the use of video footage showing plaintiff walking down a public street in a documentary about prostitution because the image implied the woman was in fact a prostitute); Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945) (holding that a false publication identifying the plaintiff as a member of the Communist party was defamatory); Staples v. Bangor Hydro-Electric Co., 629 A.2d 601 (Me. 1993) (holding that false accusations within a company that a fellow employee sabotaged a company computer are defamatory).

Many scholars have debated whether the public disclosure of private facts tort creates a new legal right at all, or whether it merely presents a duplicate tort of intentional or negligent infliction of emotional distress. For example, a critical commentator, has labeled it a "phantom tort [whose] cases present facts dangerously near the edge of triviality based on an evil that judges believe is largely mythical." Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983). However, other scholars have characterized "the sensational exposure of the intimate details of a private life in the mass media as a deeply intrusive impairment of the intimacy and inner space necessary to individuality and human dignity." Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 53 (1974).

11. *See generally* discussion *infra* Part II. As the Supreme Court of the United States has emphasized, the First Amendment ensures that debate on public issues will remain "uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). However, there are numerous conflicting theories as to what the purpose and scope of the First Amendment should be. The following summary by Professor Thomas Emerson is considered one of the leading explications of the scope and role of the First Amendment in our democratic system: (1) assurance of individual self-fulfillment; (2)

public disclosure tort has yet to evolve into a potent legal doctrine that serves as a substantial check on the unfettered discretion of the press.[12] Rather, most courts have limited the public disclosure tort's applicability to egregious situations where an actionable invasion of privacy is readily apparent.

However, at the same time that courts have been reluctant to expand the public disclosure tort, legislatures have begun to recognize that privacy rights warrant protection. For example, the California Legislature recently enacted California Civil Code section 1708.8 to limit intrusive newsgathering by the press that trammels upon privacy rights.[13] This statutory enactment demonstrates that intrusive media coverage is recognized as a societal problem. Moreover, this statute expressly states that this "section shall not be construed to limit all other rights or remedies of plaintiff[s] in law or equity, including, but not limited to, the publication of private facts."[14] This signifies that the California Legislature believes that the public disclosure tort is an important common law cause of action that should provide aggrieved plaintiffs with compensatory damages. But, at what point does the press cross the line between a legitimate publication and an actionable invasion of a person's privacy?

This comment traces the history of the public disclosure of private facts tort[15] and describes the approaches taken by courts to strike a balance between an individual's right to recover damages for the publication of truthful, but private, facts[16] and the media's First Amendment right of free press.[17]

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advancement of knowledge and the discovery of truth; (3) facilitation of participation in the political process; and (4) maintenance of the appropriate balance between stability and change. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 1, 6 (1970).

12. One of the biggest obstacles facing a public disclosure of private facts plaintiff is the fact that many of these cases are resolved on summary judgment. Rather than allowing the law in this area to expand via the case law, all too often, speech protective judges rule as a matter of law and dismiss cases before a jury can evaluate the merits of a claim.

13. CAL. CIV. CODE § 1708.8 (West 1999). In addition to this recent statute, the California Legislature has also recognized the need to protect an individual's right of publicity. This right protects an individual from the unauthorized use of the individual's name or likeness for commercial purposes. *See* CAL. CIV. CODE § 3344 (West 1971).

14. CAL. CIV. CODE § 1708.8(e) (West 1999).

15. *See infra* Part II.A.

16. A common law right of privacy is now recognized in the majority of

Courts should distinguish between the level of First Amendment protection afforded matters of general political or judicial concern and those matters related solely to private aspects of people's lives.[18] Furthermore, courts should seldom grant summary judgment motions in these cases. Instead, the jury, as the voice of the community, should decide whether the press is impermissibly intruding into ostensibly private affairs. Finally, this comment proposes several factors that courts should consider when determining whether a publication is truly newsworthy or merely an unjustified intrusion into private matters. This comment concludes that the proper way to resolve these tough legal issues is through a totality of the circumstances ad hoc balancing test applied by the jury rather than through judicial application of bright line standards that overestimate the chances free speech will be chilled by imposing tort liability.

II. BACKGROUND

A. *The Origins of the Right of Privacy*

The theory that privacy should be a legally protected right was first articulated in an 1890 law review article written by Louis D. Brandeis and Samuel D. Warren.[19] The article, which was a reaction to the editorial practices of Boston newspapers, stated:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the

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jurisdictions in the United States. *See* Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964); Apodac v. Miller, 441 P.2d. 200 (N.M. 1968); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Haw. 1968); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

17. This comment presents an extensive background section, which examines the leading California and United States Supreme Court public disclosure of private facts cases. This section contains lengthy factual accounts and a detailed description of the courts' holdings because this is an especially fact-specific area of the law where cases are often narrowly decided on their own discrete facts. *See infra* Part II.B-E.

18. *See infra* Part IV.A.

19. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

> sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' Of the desirability "indeed the necessity 'of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[20]

In articulating their privacy theory, Brandeis and Warren expressed their belief that the common law is flexible enough to meet the changing needs of society without the necessity of legislative intervention.[21] They argued that the common law should afford an injured citizen a right to recover damages from publishers who intrude into the domestic circle and write articles about the "private life, habits, acts, and relations of [ ] individuals [which have] no legitimate connection with [a person's] fitness for a public office . . . and [which have] no legitimate relation to or any bearing upon any act done by him in a public or quasi public capacity."[22] The authors conceded that the right of privacy is not absolute and must yield to the public's right to know in certain circumstances.[23] They felt information regarding an individual's fitness for office or other information relevant to

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20. *Id.* at 196.

21. *Id.* at 194.

22. *Id.* at 215.

23. *Id.* at 214. Warren and Brandies acknowledged that the right of privacy is a limited right that must be balanced in light of other constitutional rights. In articulating their privacy theory, the authors noted the following:

> (1) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render the it a privileged communication according to the law of slander and libel . . . . (2) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage. (3) The right to privacy ceases upon the publication of the facts by the individual, or with his consent . . . . (4) The truth of the matter published does not afford a defen[s]e . . . . (5) The absence of "malice" in the publisher does not afford a defen[s]e.

Id.

a person's public or quasi-public activities does not create an actionable violation of a person's privacy rights.[24]

Twelve years after Warren and Brandies's law review article, the theory of invasion of privacy was rejected by the first court to consider it in *Roberson v. Rochester Folding Box Co.*[25] In *Roberson*, the defendant flour company, obtained a good likeness of the plaintiff and reproduced it on their advertising posters.[26] Despite the plaintiff's claim that she felt humiliated and suffered great distress, the court, in a four to three opinion, rejected a common law privacy action.[27] Among the reasons articulated by the court for its opinion were: 1) concerns about innovating the law after so many centuries; 2) an inability to see how the doctrine would work; and 3) if accepted, how it could be properly limited to prevent windfalls to those who both enjoyed the publicity, yet still wanted to collect damages for it.[28] Although the court discussed Warren and Brandeis' article at length, it concluded that the precedents relied upon were too remote to sustain the proposed right.[29]

Immediate public outcry followed the *Roberson* decision as a disenchanted public clamored for protection of individual privacy rights. Shortly thereafter, the New York Legislature responded by creating a very narrow statutory right of privacy.[30] Although this statute merely prohibited the appropriation of a person's identity for trade or advertising purposes,[31] it legitimized Warren and Brandeis's notion that each individual has a right to privacy. This statute not only

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24. Among the recognized matters of legitimate societal concern that the press could publish with impunity were activities occurring in courts of law, legislative bodies, municipal assemblies, and practically any other communications made in a public body, or in any quasi-public capacity. *Id.*

25. 64 N.E. 442 (N.Y. 1902).

26. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902).

27. *Id.*

28. *Id.* at 444.

29. *Id.* at 449.

30. This provision states:

> A person, firm, or corporation that uses for advertising purposes, or the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. CIV. RIGHTS § 50 (1902). This statute is much like CAL. CIV. PROC. CODE § 3344, which also protects against the unauthorized use of a person's name or likeness for commercial purposes.

31. *Id.*

legitimized the right of privacy in New York, but also provided persuasive justification for other states to develop their own privacy laws.

Three years after *Roberson*, the Supreme Court of Georgia faced a similar fact situation in *Pavesich v. New England Life Insurance Co.*[32] In this case, the defendant insurance company utilized the plaintiff's name and picture in its advertisements for life insurance without obtaining the plaintiff's consent.[33] In analyzing the plaintiff's claim for invasion of privacy, the court traced the history of privacy back to the natural rights of man[34] and Roman law.[35] The court also stated that a right to privacy based upon a supposed right of property, or a breach of trust or confidence, had been recognized in both England and the common law of the United States.[36] Conceding that a right of privacy independent of property or contract rights had yet to be recognized,[37] the court nonetheless stated that the novelty of the claim did not prevent the common law from affording a remedy.[38] The court scrutinized the constitutional right to liberty[39] and held that it was broad enough to encompass a right to privacy.[40] Consequently, the court rejected the conclusion in *Roberson*[41] and held that a common law cause of action for invasion of privacy could be maintained.[42]

In defining the scope of the right to privacy, the *Pavesich*

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32. 50 S.E. 68 (Ga. 1905).
33. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905).
34. *Id.* at 70.
35. *Id.*
36. *Id.* at 69.
37. *Id.*
38. *Id.* at 70.
39. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).
40. *Id.* at 70. In construing the right to liberty, the court stated:

> When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. . . . Each person has a liberty of privacy, and every other person has, as against him, liberty in reference to other matters, and the line where these liberties impinge upon each other may be hard to define; but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be.

Id. at 70-72.

41. *Id.* at 77. The court in *Pavesich* was unwilling to accept the *Roberson* conclusion that a right of privacy could not legitimately be inferred from the common law and the commentaries of legal scholars. *Id.*
42. *Pavesich*, 50 S.E. at 78.

court discussed the implications of living in a civilized society.[43] Although the court acknowledged the existence of a common law right of privacy, it maintained that this right is not absolute.[44] The court ruled that the right to free speech could, at times, outweigh the individual's interest in privacy.[45] In holding that the plaintiff established a valid claim for invasion of privacy, the court emphasized that the competing interests of free press and privacy must be balanced so that neither right is abused to the detriment of the other.[46]

Following the decision in *Pavesich,* numerous courts throughout the country began to consider whether a common law cause of action for invasion of privacy could be maintained. Although, *Pavesich* dealt specifically with the unauthorized use of a person's identity, the court's dicta expressed approval of the tort theory that public disclosure of private facts could be recognized as an actionable invasion of privacy.[47] However, it was not until the 1931 California case of *Melvin v. Reid,*[48] that the public disclosure of private facts tort gained serious acceptance.[49]

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43. *Id.* at 69.

44. *Id.*

45. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905). The court stated:

> [S]o long as the truth is adhered to, the right of privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably and legitimately proper in an expression of opinion on a subject that is under investigation. It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press.

Id. at 74-75.

46. *Id.* The court stated that the key considerations in evaluating the scope of First Amendment protection for publications were: 1) whether the subject matter of the publication was of legitimate public concern and 2) whether the publication of such a matter was reasonable. *Id.* The court held that there might be cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press,

> as in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion, for no other purpose and with no other motive than to annoy and harass the individual referred to .... [I]f such should arise, the party aggrieved may not be without a remedy.

Id. at 74.

47. *Id.*

48. 297 P. 91 (Cal. Ct. App. 1931).

49. This comment is limited mainly to a discussion of the evolution of the public disclosure of private facts tort as it has developed in California and as it

B. *Development of the Right to Privacy in California*

In *Melvin*, the California court of appeal considered whether the plaintiff, a reformed prostitute,[50] could recover damages based upon the defendant's production of a motion picture that utilized her true maiden name when documenting her acquittal at a murder trial thirteen years earlier.[51] As a result of the film, the plaintiff claimed she was scorned and abandoned by those who did not know of her past and endured grievous mental and physical suffering.[52]

In evaluating the merits of the case, the *Melvin* court stated that the law of privacy is recent in origin,[53] varies from jurisdiction to jurisdiction,[54] and presents a novel question of law in California.[55] In analyzing what privacy means and whether California would recognize such a right, the court stated that privacy has generally been defined as the "right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone."[56] However, the court added, despite the fact that an individual may desire to remain in obscurity and avoid having his life exposed to the public gaze, the right to privacy is not absolute.[57] The court explained that there might be times when an individual becomes involved in an activity or occurrence of public or general interest that justifies publicity, regardless of the individual's desire to remain anonymous.[58]

Applying this standard, the court held that the use of the incidents of the plaintiff's life relating to the murders was not an actionable invasion of privacy because they were recorded

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has been considered by the United States Supreme Court. Because other states have experienced a parallel development in their respective common law, California precedent is valuable in understanding the emergence of this tort.

50. Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

51. *Id.* The plaintiff abandoned her former life of prostitution thirteen years earlier and became entirely rehabilitated. She married, and began caring for her home, and thereafter assumed a place in respectable society and made many friends who were not aware of the incidents of her earlier life. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 92.

56. Melvin v. Reid, 297 P. 91, 92 (Cal. Ct. App. 1931).

57. *Id.* at 92-93.

58. *Id.* at 93.

in public records that were available for public inspection.[59] The court stated that "the very fact that they were contained in a public record is sufficient to negative the idea that their publication was a violation of the right of privacy."[60] However, the court reached a different conclusion on the issue of the use of the plaintiff's name in the film.[61] In holding that disclosure of the plaintiff's true maiden name was a violation of her privacy rights, the court relied upon the language of the California Constitution, which states: "[a]ll men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness."[62] The court construed the language granting the right to pursue and obtain happiness as broad enough to encompass a right of privacy that protects individuals from unwarranted attacks upon one's liberty, property, and reputation.[63] In addition, the court cited policy considerations such as the rehabilitation of criminals as further justification for sustaining the plaintiff's cause of action.[64]

Most significant to the court's analysis was its use of a moral and ethical standard by which it evaluated the publication. The court found that the publication

> was not justified by any standard of morals or ethics known to [the court], and was a direct invasion of [the

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59. *Id.*

60. *Id.*

61. *Id.*

62. Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931) (quoting CAL. CONST. art. I, § 1). It is important to note that this language was excerpted from the California Constitution as it existed in 1931. The California Constitution was later amended in 1974 to expressly include the right of privacy as an inalienable right. CAL. CONST. art. I, § 1.

63. *Melvin*, 297 P. at 93.

> The use of the appellant's true name in connection with the incidents of her former life . . . was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.

Id.

64. *Id.* The court's reliance on policy considerations to determine whether the plaintiff's privacy had been invaded established that policy would be an important factor in future privacy cases. This is significant because it shows that public disclosure of private facts cases turn on the balancing of numerous factors.

> plaintiff's] inalienable right.... Whether we call this a right of privacy or give it another name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others."[65]

Although the holding in *Melvin* was not universally followed, it became the leading opinion on the public disclosure of private facts tort throughout the majority of jurisdictions.[66]

C. *The Struggle to Define the Elements and Scope of the Tort*

After *Melvin*, California courts struggled to strike the appropriate balance between individual privacy rights and the freedom of the press.[67] Although *Melvin* established that a right to privacy exists,[68] the exact contours of this right were far from certain. Instead of utilizing a bright line test or enunciating hard and fast rules, the *Melvin* court relied on an ad hoc judicial approach to resolve the issue.[69] As a result, subsequent courts were free to create their own judicial tests to determine when the press violated individual privacy rights.[70]

Although there were a few minor cases in the years

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65. *Id.* It is also important to note that the court felt compelled to evaluate the morality of the publication's content. Rather than relying solely on legal analysis and policy considerations, the court also relied upon a basic notions of fairness and societal decency to reach its conclusion. This indicates that community values are an extremely important consideration when determining how to strike the balance between the press's right to publish and the individual's right to privacy.

66. *See generally* ALDERMAN & KENNEDY, *supra* note 5, at 155. The public disclosure of private facts tort is not recognized in all jurisdictions. Some states have refused to recognize an individual's right to keep certain information private. Many of these states have cited a lack of precedent, the purely mental character of the injury, a fear of a flood of litigation, and the difficulty of drawing a line between private and public figures as justifications for not recognizing the public disclosure of private facts tort. In addition, these states have also relied on the broad scope of the First Amendment as further justification for denying their citizens a privacy cause of action. Often, states that do not recognize the tort rely on language of the United States Supreme Court, which indicates that "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a State." Thornhill v. Alabama, 310 U.S. 88, 95 (1967).

67. *See infra* Part II.C-E.

68. Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931).

69. *Id.*

70. *See infra* Part II.C.

following the *Melvin* decision,[71] the law did not begin to take shape until the 1952 case of *Gill v. Curtis Publishing Co.*[72] In *Gill*, the defendant published an article discussing the difference between love based upon "affection and respect" and love based exclusively upon "sex attraction."[73] To illustrate this dichotomy, the defendant snapped a photo of the plaintiffs while engaged in an affectionate pose and used the photo as an example of the "wrong" kind of love.[74] As a result, the plaintiffs, a married couple running an ice-cream store, lost $200,000 in business and suffered great emotional distress.[75]

In reversing the lower court's demurrer, the *Gill* court held that the plaintiffs had set forth a sufficient claim under the public disclosure tort.[76] Much like the court in *Melvin*, which concluded that it was unnecessary for the press to include the plaintiff's true maiden name, the *Gill* court concluded that the inclusion of the plaintiffs' actual likeness in the photo was unnecessary.[77] In reaching this conclusion, the court noted the importance of balancing the privacy rights of individuals against the press's right to publish:

> The right of privacy does undoubtedly infringe upon absolute freedom of speech and of the press, and it also clashes with the interest of the public in having a free dissemination of news and information. These paramount public interests must be taken into account in placing the necessary limitations on the right of privacy. But if this

71. *See* Metter v. Los Angeles Exam'r., 95 P.2d 491 (Cal. Ct. App. 1939) (holding news value of name and picture of a suicide victim who jumped from downtown building outweighed husband's privacy claim); *see also* Kerby v. Hal Roach Studios, 127 P.2d 577 (Cal. Ct. App. 1942) (holding publicity unjustified for an actress's signing of a questionable letter); *cf.* Cohen v. Marx, 211 P.2d 320 (Cal. Ct. App. 1950) (holding legitimacy of publication turned on the legitimacy of the public's interest in a prize fighter).

72. 239 P.2d 630 (Cal. Ct. App. 1952).

73. Gill v. Curtis Publ'g Co. 239 P.2d 630, 632 (Cal. Ct. App. 1952).

74. *Id.*

75. *Id.*

76. *Id.* at 634-35.

77. *Id.* at 634. The court felt that the inclusion of the photograph did not contribute significantly to the content of the defendant's article. "The article, to fulfill its purpose and satisfy the public interest, if any, in the subject matter discussed, could, possibly, stand alone without any picture." *Id.* This language is significant because it demonstrates that the court was willing to look at the necessity of including the private facts, rather than merely deferring to the publisher's decision to include it.

> right of the individual is not without qualifications, neither is freedom of speech and of the press unlimited. The later privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. . . . [T]he constitutional guarantees of freedom of speech and of the press do not warrant the publication of matter constituting an invasion of the right of privacy any more than they give the right to defame a person.[78]

The court concluded that it was necessary to balance the competing interests involved and enunciated the following standard by which to evaluate public disclosure cases:

> The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of *balancing the public interest* in the *dissemination of news, information and education* against the *individual's interest in peace of mind and freedom from emotional disturbances*. . . . Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy. . . . [L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. . . . If the test is [ ] what an ordinary man would consider such, then it is a question for the trier of fact rather than one of law.[79]

Thus, the *Gill* court appeared to create a judicial balancing test that accounted for the necessity of the published matter, the public's legitimate interest in that matter, the offensiveness of the publication, and the social policies implicated by the publication.

Nearly two decades after *Gill*, the California Supreme Court addressed the difficult issue of striking the balance between privacy rights and free speech in the case of *Kapellas v. Kofman*.[80] In *Kapellas*, the plaintiff, a candidate for the local city council, brought a public disclosure of private facts

78. *Id.* at 633.

79. Gill v. Curtis Publ'g Co. 239 P.2d 630, 634 (Cal. Ct. App. 1952) (emphasis added).

80. 459 P.2d 912 (Cal. 1969).

suit on behalf of herself and her minor children against the publisher of two local newspapers that published editorials questioning her fitness for office.[81] The articles questioned the plaintiff's fitness by highlighting the fact that her children had been involved in trouble with the law on numerous occasions.[82] The trial court granted the defendant's demurrer on the claim and the Supreme Court affirmed.[83]

The Supreme Court explained that an individual's right to privacy must be balanced against society's right to be informed by the press of "newsworthy matters."[84] In determining which matters are constitutionally protected as "newsworthy," the court explained that it considers "a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety."[85] The court further explained that information already in the public domain and slight intrusions into private life are privileged even though the social value of the published material may be minimal.[86] Moreover, the court indicated that where the public interest in published information is substantial, the press is allowed greater leeway, especially if the individual assumed the risk of voluntarily entering the public sphere.[87] Thus, because the plaintiff held herself out as a candidate for public office, the defendant had a broad privilege to publish information that related to her fitness for the position.[88]

Two years later, the California Supreme Court heard another public disclosure of private facts case in *Briscoe v.*

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81. Kapellas v. Kofman, 459 P.2d 912, 914 (Cal. 1969).

82. *Id.* at 914-15.

83. *Id.* at 914.

84. *Id.* at 922. "Sensitive to the privacy tort's potential encroachment on the freedoms of speech and the press, our courts have recognized a broad privilege cloaking the truthful publication of all newsworthy matters." *Id.*

85. *Id.* (citing on Gill v. Curtis Publ'g Co., 239 P.2d 630 (1952)).

86. *Id.*

87. Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969).

88. *Id.* at 919.

> [The court noted that it would be] most reluctant to impede the free flow of any truthful information that may be relevant to a candidate's qualifications for office. Although the conduct of the candidate's children in many cases may not appear particularly relevant to his qualifications for office, normally the public should be permitted to determine the importance or relevance of the reported facts for itself.

Id. at 923.

Reader's Digest Assoc.[89] In *Briscoe*, the court considered whether the trial court had properly granted a demurrer in favor of the appellee, who had written an article about truck hijackings that specifically named the appellant as a former perpetrator, even though the event happened eleven years earlier.[90] Although the appellant conceded that the article was newsworthy, the appellant argued that the use of his actual name constituted an invasion of privacy.[91]

The California Supreme Court began its analysis by recognizing the legitimacy of the public disclosure of private facts tort.[92] The court then noted that the "central purpose of the First Amendment is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[93] In addition, the court explained that freedom of the press is not "confined to comment upon public affairs and those persons that have voluntarily sought the public spotlight."[94] Nonetheless, the court stated that not all factual accounts of current events are privileged and that reports of public concern or interest are most entitled to First Amendment protection.[95] The court unequivocally stated that truthful reports of *current* crimes and the names of suspected perpetrators are privileged, newsworthy matters under the First Amendment.[96] However, the court did not hold that disclosure of the names of *former*

89. 483 P.2d 34 (Cal. 1971).

90. Briscoe v. Reader's Digest Assoc. 483 P.2d 34, 34-35 (Cal. 1971).

91. *Id.* at 36.

92. The court stated that the "[a]cceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices, with their capacity to destroy an individual's anonymity, to intrude upon his most intimate activities, and expose his most personal characteristics to public gaze." *Id.* at 37.

93. *Id.* at 44 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 75 n.5 (1960).

94. *Id.* at 38.

95. *Id.* The court noted that almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, would be privileged. *Id.*

96. Briscoe v. Reader's Digest Assoc. 483 P.2d 34, 39 (Cal. 1971). By identifying those individuals who have been arrested for the commission of crimes, the public interest is served by legitimately putting others on notice that the named individual may be dangerous and by increasing the possibility that witnesses will come forward to testify. *Id.*

perpetrators is per se newsworthy.[97]

In reaching its conclusion, the court reaffirmed its balancing approach to resolve the constitutional conflict between the public disclosure tort and the First Amendment. In addition, the court reaffirmed the *Kapellas* factors for determining the newsworthiness of a publication. However, despite acknowledging the role of policy in balancing privacy rights against free speech rights,[98] the court narrowed its holding by stating that the balance is always weighed in favor of free expression.[99] Accordingly the court explained, to avoid chilling "First Amendment freedoms through uncertainty, we find it reasonable to require a plaintiff to prove in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive."[100]

The following year, in *Forscher v. Bugliosi*,[101] the California Supreme Court considered whether a book written by the defendant, the former prosecutor of Charles Manson, invaded the plaintiff's privacy by describing the plaintiff's association with Manson and implicating the plaintiff in a murder.[102] In upholding the trial court's dismissal of the case on demurrer, the Supreme Court reaffirmed its balancing approach and restated the newsworthiness factors.[103]

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97. *Id.* at 40. The court explained that the social policy of rehabilitating ex-criminals may outweigh the press's right to publish. "Once legal proceedings have concluded, and particularly once the individual has reverted to the lawful and unexciting life led by the rest of the community, the public's interest in knowing is less compelling." *Id.* at 43.

98. *Id.* at 40.

> In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the general interest in an unfettered press may at times be outweighed by other great societal interests. As a people, we have come to recognize that one of these societal interests is that of protecting the individual's right to privacy. The right to know and the right to have others not know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.

Id.

99. *Id.* at 43 (citing Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968)).

100. *Id.* at 44.

101. 608 P.2d 716 (Cal. 1980).

102. Forscher v. Bugliosi, 608 P.2d 716, 717-22 (Cal. 1980).

103. *Id.* at 724-28.

However, the court went to great lengths to diminish the role of social policy in balancing the First Amendment against privacy rights by limiting the holding of *Briscoe*.[104] The court stated the following:

> California courts have refrained from extending the *Briscoe* rule to other fact situations. . . . Our decision in *Briscoe* was an exception to the more general rule that once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.[105]

Therefore, the California Supreme Court expanded the scope of newsworthiness protection for the press and downplayed the importance of policy considerations in the balancing process.[106] Although the court did not eliminate the role of policy completely from its calculus, the court's opinion seemed to indicate that only an exceptionally strong social policy would outweigh the newsworthiness of a publication in future public disclosure of private facts tort cases.[107]

After the California Supreme Court's expansion of the newsworthiness privilege in *Forscher*, it appeared that the public disclosure of private facts tort had lost its bite. However, the appellate court decision in *Diaz v. Oakland Tribune, Inc.*[108] confirmed that the public disclosure tort still had some teeth. In *Diaz*, the plaintiff, who was the student body president of a local community college, sued a local newspaper after it published an article[109] indicating that she had undergone an earlier sex-change operation.[110] Diaz, who kept the surgery a secret from all but her family and closest friends, had changed her name and made all necessary changes to her identification records.[111] The jury found for the

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104. *Id.* at 725-26.
105. *Id.* at 726.
106. *Id.* at 727-28.
107. Forsher v. Bugliosi, 608 P.2d 716, 727-28 (Cal. 1980).
108. 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).
109. The article stated:

> The students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio. Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.

Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 766 (Cal. Ct. App. 1983).
110. *Id.* at 765.
111. *Id.*

plaintiff and the defendant appealed,[112] claiming the trial court had erroneously instructed the jury that the defendant had the burden of proving his publication newsworthy.[113]

Although the court agreed with the defendant that the jury had been improperly instructed on the burden of proof regarding newsworthiness,[114] the court examined the newsworthiness issue in greater detail and struck a blow in favor of privacy rights.[115] The court stated that newsworthiness is to be "measured along a sliding scale of competing interests"[116] by using the three-factor test of *Kapellas*.[117] The court explained that the newsworthiness of a publication "depends upon contemporary community mores and standards of decency [which] is largely a question of fact [that] a jury is uniquely well-suited to decide."[118] Acknowledging that allowing a jury to decide this issue creates a danger of punishing unpopular speech and persons,[119] the court felt "any risk of prejudice may be checked

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112. *Id.* at 766.

113. *Id.*

114. The court found that the important societal benefit conferred by a free and uncoerced press warranted placing the burden of proving newsworthiness on the plaintiff. *Id.* at 768-69.

115. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771-73 (Cal. Ct. App. 1983).

> Of course the right to privacy is not absolute and must be balanced against the often competing constitutional right of the press to publish newsworthy matters.... However, the newsworthy privilege is not without limitation. Where the publicity is so offensive as to constitute "a morbid and sensational prying into private lives for its own sake . . ." it serves no legitimate public interest and is not deserving of protection.

Id. at 767 (quoting RESTATEMENT (SECOND) OF TORTS, § 652D, cmt. h. (Tentative Draft, No. 21, 1975)).

116. The court emphasized the importance of striking a balance between the individual's right to keep private facts from the public's gaze and the public's right to know. Because each of these rights is of great importance, the court indicated that evaluation of the interests requires careful scrutiny of the facts involved. *Id.* at 771.

117. *Id.*

> In an effort to reconcile these competing interests, our courts have settled on a three-part test for determining whether matter published is newsworthy: "[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."

Id. (quoting Kapellas v. Kofman, 459 P.2d 912 (Cal. 1969)).

118. *Id.* at 772.

119. *Id.*

by close judicial scrutiny at the stages of litigation."[120] The court noted that the same concerns about juries sanctioning unpopular speech are also present in the "related field of obscenity law, where community standards define which speech is constitutionally protected."[121] Thus, the court concluded, a jury should decide whether the "connection between the information disclosed"[122] and the newsworthiness of the subject matter are sufficiently close so as to insulate the press from tort liability.[123]

Despite the attempts of the *Diaz* court to reaffirm the public disclosure tort as a check on intrusive media coverage, a ruling by another state appellate court in *Sipple v. Chronicle Publishing Co.*,[124] broadened the scope of the media's newsworthy privilege. In *Sipple*, the court considered whether summary judgment had properly been granted in favor of a group of media defendants that published an article disclosing the appellant's homosexuality after he foiled an assassination attempt on President Gerald Ford's life.[125] In affirming the trial court's grant of summary judgment,[126] the appellate court held that the disclosure of Sipple's homosexuality was a matter of legitimate public concern and, therefore, newsworthy because it dispelled the myth that homosexuals were weak.[127]

After setting forth the elements of the tort,[128] the court

120. *Id.* Procedures such as summary judgment, directed verdicts, and judgment notwithstanding the verdict could be used to curb unfettered jury discretion.

121. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983).

122. *Id.* The court's use of the term "connection" is significant because it indicates that the court believes there must be some relationship between the information disclosed and the underlying subject matter that makes press coverage of the matter newsworthy.

123. *Id.*

124. 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

125. Sipple v. Chronicle Publ'g, 201 Cal. Rptr. 665, 666 (Cal. Ct. App. 1984).

126. *Id.* at 671.

127. *Id.* at 669.

128. *Id.* at 667-68 (citations omitted).

> It is well settled that there are three elements of a cause of action predicated on tortious invasion of privacy. First, the disclosure of the private facts must be a public disclosure. Second the facts disclosed must be *private facts*, and not public ones. Third, the mater made public must be one which would be offensive and objectionable to a reasonable person of ordinary sensibilities.

Id.

noted that summary judgment is a preferred procedure in resolving these cases because it eliminates protracted litigation that would otherwise have a chilling effect on the exercise of First Amendment rights.[129] The court broadly stated that "due to the supreme mandate of the constitutional protection of freedom of the press even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy."[130] Rather than simply applying the standard three-factor Kapellas newsworthiness test, the court seemed to create a new test for newsworthiness. The court explained that the

> paramount test of newsworthiness is whether the matter is of legitimate public interest which in turn must be determined according to the community mores. . . . The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern.[131]

Although it is unclear whether this court attempted to forge a new test for newsworthiness, it certainly expanded the newsworthiness privilege for the press.

D. *The United States Supreme Court's Balancing of Privacy and Freedom of the Press*

The only Supreme Court decision considering the common law public disclosure of private facts tort is *Cox Broadcasting Corp. v. Cohn*.[132] In *Cox*, the father of a raped

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129. *Id.* at 668.

130. *Id.* at 668. It appears that this court felt a publisher may not be held liable for the publication of private facts so long as the subject matter of the publicity is of legitimate public concern. Rather than engaging in a balancing of interests or examining the connection between the information disclosed and the subject matter of legitimate concern, the court here established a bright line standard to evaluate these cases.

131. Sipple v. Chronicle Publ'g, 201 Cal. Rptr. 665, 670 (Cal. Ct. App. 1984) (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).

132. 420 U.S. 469 (1975). Generally, the Supreme Court will not review state court decisions in the area of torts because the Court's appellate jurisdiction over state court decisions is limited. *See* U.S. CONST. art. III, § 2. Usually, the Court only reviews state tort decisions if federal questions are involved or Constitutional defenses are asserted. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

and murdered teenager brought an action for invasion of privacy against a local television station based upon a Georgia statute that made it a misdemeanor to publish or broadcast the name of a rape victim.[133] The reporter obtained the name of the victim from the indictment and identified the victim during a news broadcast.[134] The trial court held that the father had a legally cognizable claim for invasion of privacy based on the reporter's violation of section 26-9901 of the Georgia Code.[135] On appeal, the Georgia Supreme Court rejected the appellant's claim that the victim's name was a matter of public interest that could be published with impunity under the First Amendment.[136]

The United States Supreme Court reversed the judgment of the Georgia Supreme Court.[137] The Court held that the state may not, consistently with the First and Fourteenth Amendments, impose sanctions on the accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection.[138] Because the reporter based his televised report upon notes taken during court proceedings and from official court documents open to public inspection, the Supreme Court ruled that liability could not be imposed for giving additional publicity to truthful information already available to the public.[139]

In reaching its conclusion, the Court stated that the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[140] Moreover, the Court indicated that the interests of privacy fade when the

133. GA. CODE ANN. § 26-9901 (1972).

134. Cox Broad. Corp., v. Cohn, 420 U.S. 469, 472-74 (1975).

135. *Id.* at 474.

136. *Id.* at 475.

137. *Id.* at 497.

138. *Id.* at 492-96.

139. *Id.* at 494 (citing comment c of section 652B of the Restatement of Torts which states: "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public."). *Id.* at 495.

140. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975). The Court ruled that public records, by their very nature, are of interest to those concerned with the administration of government. Consequently, the media confers a public benefit when it reports the true contents of public records.

information involved already appears in public records, "especially when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press."[141]

However, the Court noted that the public disclosure of private facts tort is not without force, as strong arguments can be made that there is a zone of privacy surrounding every individual,[142] which states may protect from intrusion by the press.[143] The Court stated that the interests of both privacy and free press are plainly rooted in the traditions and significant concerns of our society.[144] Nonetheless, the Court ruled that the appellant's broadcasting of information contained in public records outweighed the appellee's interest in privacy under the circumstances of the case.[145] However, the Court cautioned that its holding was narrow and did not stand for the proposition that all publications of truthful information are immune from criminal or civil liability.[146]

The United State Supreme Court has not reviewed another common law public disclosure of private facts case. However, the Court did consider a similar statutory cause of action in *Florida Star v. B.J.F.*[147] In *B.J.F.*, the appellant, Florida Star, a newspaper company, was sued for invasion of privacy for publicly naming the appellee as the victim of a rape.[148] The newspaper obtained the victim's name from a copy of the police report that was sent to the pressroom.[149] In publishing B.J.F.'s identity, the newspaper not only violated its own internal policy of not printing the names of rape

141. *Id.*

142. "Indeed, the central thesis of the root article written by Warren and Brandeis . . . was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses." *Id.* at 487.

143. *See* EMERSON, *supra* note 11, at 544-62; Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966).

144. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

145. *Id.* at 496. With respect to judicial proceedings in particular, the press functions to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. *See* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

146. *Cox*, 420 U.S. 469, 496-97.

147. 491 U.S. 524 (1989).

148. Florida Star v. B.J.F., 491 U.S. 524, 527-28 (1989).

149. *Id.* at 526.

victims, but also violated section 794.03 of the Florida Penal Code, which made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of a victim of a sexual offense.[150] The plaintiff's civil action was based upon negligence with the violation of the criminal statute being used as a predicate for a negligence per se instruction.[151] Pursuant to this statute, the Florida Star was found negligent per se.[152] The Supreme Court of Florida denied discretionary review.[153]

In reviewing the decision of the lower courts, the United States Supreme Court indicated that its past decisions involving governmental attempts to sanction the accurate dissemination of information had not exhaustively considered the conflict between the right of free press and the right of privacy.[154] "[A]lthough our decisions have without exception upheld the press's right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context."[155] In emphasizing the narrowness of its prior holdings, the Court stated that it "continue[d] to believe that the sensitivity and significance of the interests presented in clashes between the First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[156] Therefore, the Court maintained that the publication of lawfully obtained truthful information about a matter of public significance cannot constitutionally be punished without a need to further a state interest of the highest order.[157]

Applying this rule, the Court found section 794.03 to be an unconstitutional restraint on the First Amendment's protection of freedom of press.[158] Again, just as in *Cox*, the

150. FLA. STAT. ch. 794.03 (1987).
151. *B.J.F.*, 491 U.S. at 528.
152. *Id.* at 535.
153. *Id.*
154. Florida Star v. B.J.F., 491 U.S. 524, 530 (1989).
155. *Id.*
156. *Id.* at 533.
157. *Id.* (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1997)).
158. *Id.* at 541. The Court reached this conclusion by conducting a three-part analysis. *Id.* at 536-40. First, the Court considered whether the information had been lawfully obtained. *Id.* at 536. Because the appellant received the information from the sheriff's department in a police report, the acquisition of that information was deemed lawful. *Id.* Second, the Court considered whether

Court stated that its holding was limited. The Court expressly stated it was unwilling to hold that truthful publications are automatically constitutionally protected, or that there is no zone of personal privacy within which the state may protect the individual from intrusion by the press.[159] Rather, the Court only held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."[160] Under the facts presented, the Court concluded that no such interest was satisfactorily presented.[161]

In sum, the United States Supreme Court has yet to hold that the right of free press is outweighed by an individual's right of privacy.[162] However, the Court has recognized that a right of privacy not only exists, but also that such a right is deeply rooted in the history and traditions of our country.[163] The Court has refused to hold that the publication of lawfully obtained truthful information can never be subject to criminal or civil liability.[164] Rather, the Court has resolved each privacy case on its own discrete facts,[165] emphasizing that information relating to the administration of justice and government activities warrants the greatest amount of First Amendment protection.[166]

E. *Recent California Supreme Court Case Suggests a New Approach to the Public Disclosure of Private Facts Tort*

In June of 1998, the California Supreme Court rendered a plurality opinion in *Shulman v. Group W Productions,*

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punishing the press for disseminating information that is already publicly available is likely to advance the state's interest in protecting the privacy of a rape victim, and concluded that it would not. *Id.* at 537. Finally, the Court's last consideration was whether timidity and self-censorship would result from allowing the media to be punished for publishing certain truthful information. The Court concluded that such a rule would lead to self-censorship and impermissibly chill freedom of speech and press. *Id.*

159. *Id.* at 541.
160. Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).
161. *Id.*
162. *Id.* at 539.
163. *See supra* notes 138-158 and accompanying text.
164. *See supra* notes 138-158 and accompanying text.
165. *See supra* notes 138-158 and accompanying text.
166. *See supra* notes 138-158 and accompanying text.

Inc.,[167] which appears to have established a new approach to analyzing public disclosure of private facts tort cases. In *Shulman*, the court considered whether the producer of a documentary invaded the privacy of two accident victims by broadcasting scenes from the accident and statements made by the victims to rescue personnel.[168] The plaintiffs sued the producer claiming that the transmission of the documentary constituted an actionable public disclosure of private facts and that the manner in which the defendant acquired the information was an intrusion on their privacy rights.[169] The California Supreme Court reinstated the decision of the trial court concluding that summary judgment should have been granted in favor of the defendant.[170]

The court began its novel approach to this issue by recognizing the inherent difficulty of striking a balance between the competing interests of an individual's right to privacy and the societal interest in the right of free press.[171] The court then cited to the decision in *Diaz* and stated the elements of the public disclosure of private facts tort.[172] The

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167. Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998).

168. *Id.* at 475-77.

169. *Id.* at 476. Although the Supreme Court ultimately concluded that summary judgment was inappropriate on the intrusion claim, this comment will focus exclusively on the Court's treatment of the public disclosure of private facts claim.

170. *Id.* at 488-89.

171. *Id.* at 474.

> At what point does the publishing or broadcasting of otherwise private words, expression and emotions cease to be protected by the press's constitutional and common law privilege—its right to report on matters of legitimate public interest—and become an unjustified, actionable invasion of the subject's private life? How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors. . . . ? Questions of this nature have concerned courts and commentators at least since Warren and Brandeis wrote their seminal article, and continue to do so to this day.

Id.

172. *Id.* at 478 (citing Diaz, 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983)). The court also noted that the *Diaz* formulation of the public disclosure elements is quite similar to the approach taken by the Restatement, which provides:

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that . . . (a) would be highly offensive to a reasonable person and . . . (b) is not of legitimate concern to the public.

Id. (alteration in original) (citing RESTATEMENT (SECOND) OF TORTS, § 652D

court explained that the critical element to be evaluated is the "presence or absence of legitimate public interest, i.e., newsworthiness, in the facts disclosed."[173] Up until this point, the court's approach had been consistent with prior precedent. However, the court's next statement broke with prior case law:

> [L]ack of newsworthiness is an element of the private facts tort, making newsworthiness a complete bar to common law liability.... [W]here the facts disclosed about a limited, involuntary public figure bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance—the broadcast [is] of legitimate public concern, barring liability under the private facts tort.[174]

The court concluded that "under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts."[175] Thus, it appears that the court abrogated its prior balancing test in favor of a bright line rule that newsworthy publications may never be sanctioned.[176]

Although the *Shulman* plurality recognized newsworthiness as a complete bar to liability, the court lamented the difficulties of delineating the exact contours of this constitutional privilege. The court noted that defining the scope of the newsworthiness privilege is "particularly problematic, because this privilege has not received extensive attention from the United States Supreme Court"[177] and when the Court has considered the issue, its holdings have been "deliberately and explicitly narrow."[178] Moreover,

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(1979)).

173. Shulman v. Group W Productions, Inc., 955 P.2d 469, 478 (Cal. 1998).

174. *Id.*

175. *Id.* at 479.

176. The California Supreme Court attempted to reconcile this radical departure from prior precedent by characterizing its prior decisions as broad enough in scope to embrace such a rule. The court noted: "Our own decisions are consistent, if less explicit on this point." *Id.* at 478.

177. *Id.* at 479.

178. *Id.*

> Like *Cox Broadcasting*, the *Florida Star* decision provides little general guidance as to what is and is not "a matter of public significance"—what is newsworthy, in other words—or as to when, if ever, the protection of private facts against public disclosure should be considered a sufficiently important state interest to justify civil liability pursuant to the common law tort.

understanding what the term newsworthy means is also problematic "because it may be used as either a descriptive or normative term."[179] The court recognized that an extreme position on either side would have unacceptable consequences:

> If newsworthiness is completely descriptive—if all coverage that sells papers or boosts ratings is deemed newsworthy—it would seem to swallow the publication of private facts tort. . . . At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self appointed guardians of public taste.[180]

To help the court resolve the ambiguity inherent in the term "newsworthy," the court referred to earlier case law and constitutional doctrine.[181] Although citing to the *Kapellas* three-factor balancing test for guidance, the court criticized its ad hoc approach as too often leading to a"discounting society's stake in First Amendment rights . . . and unwittingly chill[ing] free speech rights."[182] Rather than employing a multi-factored balancing test, the plurality opinion created a newsworthiness test that focuses on the "logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed."[183] The court acknowledged that this standard

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Id. at 480.

179. Shulman v. Group W Productions, Inc., 955 P.2d 469, 481 (Cal. 1998). The court grappled with this dichotomy: "Is the term 'newsworthy a descriptive predicate, intended to refer to the fact that there is widespread public interest? Or is it a value predicate, intended to indicate that the publication is a meritorious contribution and that the public's interest is praiseworthy?" *Id.* (quoting Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725 (1963)).

180. *Id.*

181. *Id.* at 480-84.

182. *Id.* at 486.

183. *Id.* at 484-85.

> This approach accords with our own prior decisions, in that it balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report. . . . This approach also echoes the Restatement commentators' widely quoted and cited view that legitimate public interest does not include a morbid and sensational prying into private lives for its own sake.

Id. at 485.

grants "considerable deference to reporters and editors."[184] The court explained:

> it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate interest. By confining our interference to the extreme cases, the courts avoid unduly limiting . . . the free exercise of editorial judgment. Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.[185]

III. IDENTIFICATION OF THE LEGAL PROBLEM

As the previous cases illustrate, the public disclosure of private facts tort presents complex legal problems. Because resolution of these cases requires courts to strike a balance between the competing interests of individual privacy rights and the media's right to free speech, courts often must make difficult policy judgments.[186] As a result, courts have often established narrow holdings and decided many of these cases on their own discrete facts.[187] This principle is clearly reflected by the narrow and limited holdings of the United States Supreme Court and the fact specific holdings of California courts.[188] Although these courts have acknowledged that there may be times when truthful publications can be sanctioned, these courts have failed to articulate a sufficiently reliable approach to the public

184. *Id.*

185. *Id.* at 485. "Our analysis does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts. . . . [T]he constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature." *Id.* The court held,

> newsworthiness is not limited to "news" in the narrow sense of reports of current events. It extends also to the uses of names, likeness or facts in giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

Id. at 485-86.

186. *See supra* Part II.A-E.

187. *See supra* Part II.

188. *See supra* Part II.B-E.

disclosure of private facts tort.[189]

Although courts recognize that the newsworthiness of a publication is central to determining whether an actionable public disclosure of private facts has occurred, great uncertainty remains as to how this determination should be made. The United States Supreme Court has not established a test for newsworthiness and California courts have continually modified their approach to resolving public disclosure of private facts cases.[190] Based upon the California Supreme Court's plurality decision in *Shulman*, serious doubt has been created as to whether a bright line test, which is highly deferential to the press, has abrogated ad hoc balancing.[191] As a result, several questions have arisen as to how individual privacy rights should be protected.

Should all truthful publications receive the same level of First Amendment protection?[192] Although judicial concern about chilling free speech provides sufficient reason for courts to carefully scrutinize public disclosure tort cases, does it provide a sufficient basis for courts to rubber stamp motions for summary judgment by media defendants? Should judges be allowed to unilaterally impose their own value systems in lieu of allowing the voice of the community to be heard? How should newsworthiness be determined? Should courts still employ an ad hoc balancing test that utilizes the three factors of *Kapellas*, or should courts apply the bright line, highly deferential logical relationship test of *Shulman*?

This comment argues that courts should differentiate between the level of First Amendment protection accorded to publications discussing public matters and those discussing private matters.[193] Courts should use an ad hoc balancing test instead of bright line tests when evaluating whether or not a given publication is newsworthy.[194] In addition, in utilizing

189. *See supra* Part II.

190. *See supra* Part II.B-E.

191. *See supra* Part II.E.

192. As history reveals, the purpose of the First Amendment was to give people the freedom to express their beliefs without fear of imprisonment or sanctions from a strong central government. The First Amendment was designed to serve as a check on the operations of government and the administration of justice, not to foster the publication of gossip. *See generally* ALAN F. WESTIN, PRIVACY AND FREEDOM (1966).

193. *See infra* Part IV.A.

194. *See infra* Part IV.B.1-2.

this balancing approach, courts should not apply this test in a manner that is highly deferential to the media.[195] Rather, summary judgment should seldom be granted in these cases.[196] The jury, as the voice of the community,[197] should be allowed to determine when the media has abused its publication privilege.[198] Ultimately, this comment concludes that a failure by courts to implement such an approach to public disclosure of private facts cases will leave individual privacy rights under-protected in an era where expanding technology and commercial journalism threaten to completely obliterate the line between the public and private sphere.[199]

IV. ANALYSIS

Although courts have generally accepted the existence of a right to privacy, they have continually held that this right is not absolute.[200] At some point, the public interest in obtaining information becomes dominant over the individual's desire for privacy.[201] However, courts have also continually held that the First Amendment is not absolute.[202] Speech that creates a clear and present danger, profane speech, obscenity, and commercial speech have all received limited First Amendment protection.[203] Thus, courts facing public disclosure of private facts tort cases must reconcile the competing rights of privacy and free speech, neither of which is absolute. Striking the balance between these rights has been very difficult for courts.[204]

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195. *See infra* Part IV.B.3.

196. *See infra* Part IV.B.3.

197. *See generally* Jacobson v. United States, 503 U.S. 540 (1992); Thompson v. Oklahoma, 487 U.S. 815 (1988); Roth v. United States, 354 U.S. 476 (1957).

198. *See infra* Part IV.B.3.

199. *See infra* Part VI.

200. *See supra* Part II.

201. *See supra* Part II.

202. *See supra* Part II.

203. *See generally* Public Serv. Comm'n, 447 U.S. 557 (1980); FCC v. Pacifica, 438 U.S. 726 (1978); Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

204. As the law stands today, a plaintiff in a public disclosure of private facts tort action has a very difficult case to prove in order to recover damages. *See* Barbara Moretti, Note, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 899 (1993). *See also supra* notes 164-182 and accompanying text. Although establishing whether a particular publication is newsworthy used to involve the analysis of policy considerations, careful

This comment argues that courts confronted with public disclosure of private facts tort cases should distinguish between the level of First Amendment protection accorded to those publications that cover matters of general political, social, or judicial concern and those publications that cover private information about individuals.[205] Such a standard would not unduly chill the press, nor interfere with free speech rights. Rather, such a standard would take proper account of individual privacy rights, while at the same time allowing proper breathing space for the marketplace of ideas to flourish. In addition, courts should continue to apply an ad hoc balancing approach rather than the bright line test advocated by the plurality in *Shulman*.[206] Far from being an unworkable standard, an ad hoc balancing approach would allow courts to take proper account of the competing interests at stake in each case and allow courts to consider the totality of the circumstances.

This comment also argues that summary judgment should not be a preferred procedure in resolving public disclosure of private facts cases.[207] Although judicial concerns about chilling free speech are appropriate, these concerns are more theoretical than practical. Allowing judges to rule as a matter of law, simply because the First Amendment is implicated, deprives an aggrieved plaintiff of the opportunity to have the community evaluate the intrusiveness of the publication. Moreover, because the public disclosure of private facts tort merely affords injured plaintiffs compensatory relief *after an article has been published*, there is no danger that this tort will function as a prior restraint upon the press. Rather than censoring what the press may

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examination of the circumstances surrounding the publication, and balancing of competing rights, recent case law appears to have abandoned this ad hoc approach. *See supra* Part II.E. Rather than applying a multi-factored balancing test, it appears a bright line test is now favored in resolving these cases. *See supra* Part II.E. Currently, in California, it appears if there is a truthful publication of newsworthy material, a plaintiff does not have a cause of action. Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998). The effectiveness of the private facts tort has gradually been declining as the categories of newsworthy disclosures have expanded. Some argue this defense has "swallowed" the tort. *See* Harry Kalven, Jr., *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966).

205. *See infra* Part IV.A.

206. *See infra* Part IV.B.1-2.

207. *See infra* Part IV.B.3.

publish, the public disclosure of private facts tort simply encourages the press to exercise greater professional responsibility when determining what they will publish. Instead of allowing the press to have carte blanche power to destroy lives by publishing private facts with impunity, the public disclosure tort forces publishers to make a business decision—whether the price of destroying someone's life can be justified by commercial profits.

A. *The True Purpose of the First Amendment Is to Contribute to the Marketplace of Ideas, Not to Invade Personal Privacy*

In order to strike the appropriate balance between the right of privacy and free press, it is necessary to understand both the purpose and the scope of the First Amendment.[208] Although the First Amendment is one of the most cherished liberties of our society, it has never been held to be absolute.[209] The limits on the scope of the First Amendment become more apparent as the rights it seeks to protect clash with other constitutional rights or competing interests such as morality and decency.[210] Thus, when evaluating First Amendment cases, courts must proceed cautiously to ensure that the First Amendment does not swallow other interests that society deems worthy of protection. This is especially true when it comes to the right of privacy.[211]

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208. *See* ALDERMAN & KENNEDY, *supra* note 5, at 153.

> The right of privacy is antithetical to [the] American ideal: an open and outspoken press. Americans have always been proud of a strong First Amendment. . . . [T]he Founding Fathers considered a free press to be the bulwark of liberty, and that some 'bad' speech must be tolerated so that 'good' speech—and truth—can flourish. Indeed, in America freedom of the press is more than just a principle.

Id.

209. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (stating that the First Amendment "even as to previous restraint is not absolutely unlimited"); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

210. "These boundaries are not always marked by bright lines, and are generally best defined on a case-by-case basis." Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 552 (Cal. Ct. App. 1993). *See also* Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Employment Div. v. Smith, 494 U.S. 872 (1990).

211. *See* Briscoe v. Reader's Digest Assoc., 483 P.2d 34, 37 (Cal. 1971).

> In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by

The dangers of abusing the First Amendment are particularly high in the area of public disclosure of private facts,[212] because of ambiguity regarding what the public has a right to know.[213] Determining what the public has a right to know has become an increasingly difficult issue as society has modernized and become more complex. Because of limits on people's time and resources, the press has taken on the role of defining what the people have a right to know and, more accurately, what they want to know.[214] This principle was acknowledged by the United States Supreme Court in *Cox*: "great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to public inspection."[215] However, it is unclear to what extent the press is entitled to intrude into private matters without incurring tort liability. The confusion stems from determining when, if ever, the publication of lawfully obtained truthful information constitutes an unwarranted revelation of private information that the public has no legitimate interest in receiving.[216]

The United States Supreme Court's treatment of the right of privacy demonstrates that it has been unwilling to take a strong position in resolving the conflict between free press and privacy rights.[217] Although the Court struck the balance in favor of free speech in both *Cox* and *B.J.F.*, the

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other great societal interests. As a people we have come to recognize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others not know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.

Id.

212. *See* Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964). There is a fertile medium in this field of torts for the production of conflicts between the right of the individual to be let alone, and the right of the public to know—the latter concept being crystalized in our age old concept of freedom of speech and of the press.

Id.

213. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

214. *See* Cox Broad. Corp., v. Cohn, 420 U.S. 469, 491-92 (1975).

215. *Id.*

216. *See supra* Part II.

217. *See supra* Part II.A.

Court's holdings were extremely narrow.[218] Despite having had the opportunity to broadly hold that the publication of truthful information could never be sanctioned, the Court expressly avoided such a broad holding.[219] Instead of utilizing powerful sweeping language to signal the death knell of privacy rights, the Court struggled to limit its holdings to the discrete factual situations presented in *Cox* and *B.J.F.*[220] As a result of these narrow decisions, the Supreme Court has indicated that a right of privacy does exist and that the states have the ability to impose tort liability when the media abuses the First Amendment.[221] What could be more powerful than the Supreme Court's express statement that it was unwilling to hold that publications of truthful information could never be sanctioned?[222]

The Court noted in both *Cox* and *B.J.F.* that the key

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218. The narrowness of the United States Supreme Court's holdings in these cases was discussed by the California Supreme Court in its *Shulman* opinion. The California Supreme Court noted that the United States Supreme Court's opinion in *Cox* was "deliberately and explicitly narrow." Shulman v. Group W Productions, 955 P.2d 469, 479 (Cal. 1998). It also explained that the United States Supreme Court "proceeded cautiously and on limited grounds" in its *B.J.F.* opinion. *Id.* at 480.

219. *See* Cox Broad. Corp., v. Cohn, 420 U.S. 469, 492 (1975).

> Rather than address the broader question whether truthful publications may never be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents . . . .

Id.

220. "[A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context." Florida Star v. B.J.F., 491 U.S. 524, 527-28 (1989).

221. *See generally* Part II.D. "We do not hold that a truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press." *B.J.F.*, 491 U.S. at 535.

222. *See Cox,* 420 U.S. at 495.

> The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the later. . . . While I would not want to live in a society where freedom of the press was unduly limited, I also find regrettable an interpretation of the First Amendment that fosters such a degree of irresponsibility on the part of the news media.

Id.

consideration was the source from which the press obtained its information.[223] In *Cox*, the victim's name was obtained from a criminal indictment, which is a public record.[224] In *B.J.F.*, the victim's name was obtained from police reports, which are also public records.[225] Thus, because the press simply gave further publication to matters that were already of public record, it could not be sanctioned for further disseminating the information.[226] To reach these conclusions,

> the Court relied on the "responsibility of the press to report the operations of government" including judicial proceedings regarding crimes, and the premise that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."[227]

Thus, because the Court was addressing cases where the challenged publications were related to the operations of government and the administration of justice, liability could not be imposed.[228]

The operations of government and judicial proceedings are among the most newsworthy subjects, which the public clearly has a right to know.[229] Consequently, the scope of First Amendment protection is at its pinnacle when publications relate to these matters.[230] In addition, information contained in public records, which have already been published by the government, are also entitled to broad First Amendment protection.[231] The very fact that the government has published this information indicates that the information is of legitimate concern to the public, protected by the First Amendment.[232] But, the question remains, to what

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223. *See supra* Part II.D.

224. *Cox,* 420 U.S. at 469.

225. *B.J.F.*, 491 U.S. at 526.

226. *See supra* Part II.D.

227. Shulman v. Group W Productions, 955 P.2d 469, 480 (Cal. 1998) (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-95 (1975).

228. *See supra* Part II.A.

229. As stated by the Court in *Cox,* publications related to crimes, the prosecutions of crimes, and judicial proceedings are matters of legitimate concern. *Cox*, 420 U.S. at 491. In addition, the Court noted that the administration of government also constitutes newsworthy subject matter. *Id.*

230. *See supra* Part IV.A.

231. *See Cox*, 420 U.S. at 495; 491 U.S. at 535.

232. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

extent does the First Amendment protect truthful publications that are not related to the operations of government, judicial proceedings, or matters of public record?

This question has been left unanswered by the Supreme Court. However, had the Supreme Court intended the First Amendment to protect *all* truthful publications by the press, it would have expressly stated that intent. Instead, the Court merely indicated that the scope of First Amendment is broadest when publications relate to government operations and the administration of justice.[233] The Supreme Court's refusal to hold that all truthful publications are privileged implies that certain subject matters do not warrant the same level of First Amendment protection afforded to publications relating to the operations of government, judicial proceedings, and public records. This reflects the ideology that the First Amendment should foster an atmosphere for the free exchange of ideas.[234] However, idle gossip about embarrassing private facts does not provide a valuable contribution to the marketplace of ideas. As such, this type of speech should receive only qualified First Amendment protection.

Americans want to keep abreast with the news of the day and be fully informed about current events in the world, but not at the cost of our own privacy.[235] It is universally accepted

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> The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, which 'are no essential part of any exposition of ideas, and "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id.

233. This view of the role of the First Amendment was also expressed in the California state case of *Briscoe*: "The central purpose of the First Amendment 'is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. . . .'" Briscoe v. Reader's Digest Assoc., 483 P.2d 34, 37 (Cal. 1971) (quoting ALEXANDER MEIKELHOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960)).

234. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936) (holding that "the predominant purpose of the grant of immunity was to preserve an untrammeled press as a vital source of public information" on government affairs).

235. *See* ALDERMAN & KENNEDY, *supra* note 5, at 210.

> When the media uses its strength to uncover government corruption or lay bare a public lie, it is the country's watchdog. But when the animal roams into our cherished private sphere, it seems to turn dangerous

that the First Amendment does not set up a wall of immunity that protects the media from criminal and tort liability simply because they are gathering news.[236] Thus, courts should apply a multi-factored balancing test to determine when publications of private facts are truly newsworthy and thereby deserving of First Amendment protection.[237] Courts should not apply a highly deferential standard to *all* truthful publications.[238] Rather than applying the First Amendment broadly when reviewing privacy claims, courts should look very closely at the subject matter of the article and extend only qualified First Amendment protection to matters that are of a private nature.[239]

B. California Courts Struggle to Create a Judicial Approach to Newsworthiness

California courts had long utilized an ad hoc balancing approach to determine the newsworthiness of published material.[240] Courts considered the newsworthiness of a

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> and predatory. Then we Americans turn on the press. We want a free press, but not *that* free. In a country where individuals treasure their personal sovereignty as much as free expression, the current legal conflict between privacy and the press was inevitable. In fact, it was outrage at the press that "created" the legal right to privacy in the first place.

Id.

236. "Can it be said that the press has a constitutional right to inquire and to inform? In our view it cannot. It is because the public has a right to know that the press has a function to inquire and to inform." Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975) (quoting Columbia Broad. Sys. Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973)). "The press, then, cannot be said to have any right to give information greater than the extent to which the public is entitled to have information." *Id.* *See also* Branzburg v. Hayes, 408 U.S. 665 (1972); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

237. *See infra* Part V.

238. *See infra* Part V.

239. *See infra* Part V. The distinction between private figures and public figures is crucial in determining whether liability will be imposed in defamation cases. *See* Michigan v. Mosley, 423 U.S.96, 98 (1975). A similar analysis should be employed in privacy cases. However, instead of focusing on the status of the plaintiff, more attention should be directed to the content of the subject matter. Clearly, a story revealing that a governor had cheated on a college exam should be treated differently than a story disclosing that a private citizen had vomited in a restaurant. The former story portrays a public figure's ability to carry out a position as a government leader, whereas the later story serves little social purpose and will likely cause great distress to that individual.

240. *See supra* Part II.B-C.

publication in light of the following criteria: 1) the medium in which the material was published; 2) the extent of the publication's use; 3) the public interest served by the publication; 4) the seriousness of the publication's interference with the plaintiff's private life; 5) the social value of the published facts; 6) the depth of the publication's intrusion into ostensibly private affairs; 7) the extent to which the plaintiff voluntarily acceded to a position of notoriety; 8) the necessity of the published material; 9) the morality of the publication; and 10) the policy implications involved.[241] Only after considering all of these competing factors were courts able to determine whether the publication was of legitimate public concern and, therefore, newsworthy.[242] However, based upon the California Supreme Court's recent plurality decision in *Shulman*, it appears that this judicial balancing approach to newsworthiness may have been abrogated in favor of a new bright line standard.[243]

According to the lead opinion in *Shulman*, "where the facts disclosed about a limited, involuntary public figure bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance—the broadcast [is] of legitimate concern."[244] Under this new standard, courts do not engage in balancing to determine whether a publication is newsworthy. Rather, courts merely conduct an analysis focusing on the "logical relationship or nexus, or lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed."[245] According to the court,

> an analysis focusing on relevance allows courts and juries to decide most cases involving persons involuntarily involved in events of public interest without "balanc[ing] interests in ad hoc fashion in each case." The articulation

241. *See supra* Part II.B-C.

242. *See supra* Part II.B-C.

243. *See supra* Part II.E. Because *Shulman* was a plurality opinion, it remains unclear whether the approach advocated in Justice Werdegar's opinion will become controlling precedent. Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998). The Court was divided in this case, leaving uncertainty as to the proper judicial approach to analyzing public disclosure of private facts cases. *Id.*

244. *Id.* at 478 (citing Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Cal. Ct. App. 1983)).

245. *Id.* at 485 (citations omitted).

> of standards that do not require "*ad hoc* resolution of the competing interests in each . . . case" is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech.[246]

The court also noted that this new approach was preferable to ad hoc balancing because it confines judicial "interference to extreme cases."[247]

In elaborating on its desire to limit judicial interference with the publication process, the court stated that the constitutional privilege to publish truthful material "'ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest.'"[248] Although the court did not precisely define what constitutes an abuse of editorial discretion in the publication of private facts, it appears that the court embraced the language of the Restatement Second of Torts as reflected by the following statement: "The challenged material was thus substantially relevant to the newsworthy subject matter of the broadcast and did not constitute a 'morbid and sensational prying into private lives *for its own sake*.'"[249]

1. *California Courts Should Continue to use an Ad Hoc Balancing Test in Lieu of the Overly Deferential* Shulman *Bright Line Approach*

California courts evaluating public disclosure of private

246. *Id.* at 485-86. The Court elaborated on this idea stating: "An analysis measuring newsworthiness of facts about a limited involuntary public figure by their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest." *Id.* at 485. The Court further explicated that newsworthiness is not "governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it." *Id.* The Court added, "[i]n general, it is not for a court or jury to say how a particular story is best covered. *Id.*

247. *Id.* (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).

248. *Shulman*, 955 P.2d 469, 485 (Cal. 1998) (quoting Gilbert v. Medical Economics Co., 665 F.2d 305, 308 (10th Cir. 1981)).

249. Shulman v. Group W Productions, 955 P.2d 469, 488 (Cal. 1998) (quoting RESTATEMENT (SECOND) OF TORTS, § 652D) (emphasis added).

facts cases prior to the *Shulman* decision utilized a balancing approach that struck the correct balance between individual privacy rights and free speech rights.[250] Through the use of an ad hoc balancing test, which closely analyzed the particular facts presented, courts were able to consider all the competing rights and social policies that were implicated in each case.[251] This approach accorded sufficient protection for privacy rights and served as a check on a persistent press, constantly intruding deeper and deeper into the private sphere.[252] Because the balancing factors were well delineated by prior case law,[253] the media had sufficient notice regarding what constitutes an actionable invasion of privacy and what constitutes a protected newsworthy publication.

However, the California Supreme Court suddenly abandoned sixty years of precedent in *Shulman* and created a new judicial standard by which to analyze public disclosure of private facts cases.[254] This new standard, which seeks to eliminate ad hoc judicial balancing, establishes a bright line test for newsworthiness by examining the "logical relationship" between the facts disclosed and the event giving rise to the publication. Unfortunately, by limiting the judicial inquiry to an assessment of whether there is a "gross disproportion" between the facts disclosed and the subject matter giving rise to the publication,[255] the court has failed to accord adequate protection to individual privacy rights.

The *Shulman* opinion explains that liability for the public disclosure of private facts cannot be imposed where "some reasonable members of the community could entertain a legitimate interest in it."[256] But the court fails to adequately explain when the public's interest is legitimate and when it is not. Although the opinion refers to the Restatement's criteria of "morbid and sensational prying into private lives for its own sake" to explain when a publication is not of legitimate

250. *See supra* Part II.B-C.

251. *See supra* note 79 and accompanying text.

252. *See supra* note 80 and accompanying text.

253. *See supra* Part II.B-C.

254. As stated by Justice Brown, "[I]nexplicably, the plurality jettisons the *Kapellas* newsworthiness test in favor of its own 'logical relationship' test." *Shulman*, 955 P.2d at 503 (J. Brown dissenting).

255. *See supra* notes 164-182 and accompanying text.

256. Shulman v. Group W Productions, 955 P.2d 469, 485 (Cal. 1998).

concern, the court fails to expand upon this language.[257] It provides no examples of when the line would be crossed and an actionable invasion of privacy would occur.[258] Instead, the court creates much uncertainty with the use of this ambiguous terminology.[259] For example, how is the "morbid and sensational" standard to be applied? When is the line crossed? What criteria should be used to determine when private lives are being intruded into for "its own sake"? Unlike the prior public disclosure of private facts cases, where use of an ad hoc balancing test guaranteed that certain factors would be considered by courts, the *Shulman* approach does not guarantee that any specific criteria will be factored into judicial determinations of when publications are of legitimate public concern.[260]

The press should not be allowed to define what level of privacy individual citizens are entitled to. It is the duty of courts to strike the proper balance between the competing interests of personal privacy and free speech. As stated by Justice Brown, in her *Shulman* dissent, "[c]ontrary to the plurality's claim that it is '*accommodating* conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution,' in reality, it sacrifices the constitutional right to privacy on the altar of the First Amendment."[261] Jurors who represent the values and views of the community should determine when a publication is newsworthy and when it is not. Failure to return to the ad hoc balancing approach will greatly jeopardize personal privacy rights and will encourage the press to delve ever deeper into personal lives for the sake of commercial profits and voyeurism. A standard of extreme deference, which only sanctions the publication of private facts that are greatly disproportionate to the event giving rise to those facts, simply provides inadequate protection of privacy rights and gives the press carte blanche authority to pry into private lives.

257. *See supra* notes 164-182 and accompanying text.
258. *See supra* notes 164-182 and accompanying text.
259. *See supra* notes 164-182 and accompanying text.
260. *See supra* notes 164-182 and accompanying text.
261. *Shulman*, 955 P.2d at 503 (quoting the majority opinion, *Shulman*, at P.2d at 479).

2. *Ad Hoc Balancing Is a Workable Test that Enables Courts to Strike the Proper Balance Between Privacy Rights and Free Speech Rights*

Although the *Shulman* plurality opinion attempted to create a more predictable, bright line test for resolving public disclosure of private facts cases,[262] the creation of a logical relevance test focusing on the disparity between the facts disclosed and the event giving rise to the publication,[263] is even more amorphous and unworkable than the use of ad hoc balancing. Ad hoc balancing ensures that certain pre-determined factors will be considered in assessing the newsworthiness of a publication.[264] As a result, the press is on notice as to what factors may increase the chances that a particular publication will be held to be an invasion of privacy. However, the logical relationship test fails to indicate what criteria, if any, courts will use when evaluating the relationship between the facts disclosed and the event giving rise to the publication.[265] This ambiguity, however, from the press's perspective, is insignificant because the plurality's new approach accords them virtually unlimited reign to publish truthful information that is minimally related to the subject matter giving rise to the publication.[266] This uncertainty is extremely significant to individual citizens whose private lives may now be revealed to all of society.

Because the California Supreme Court's new approach is excessively deferential to the press, personal privacy rights, which are fundamental to self-autonomy and self-definition, are left under-protected. No longer will citizens be able to seek recourse from the courts as a way of deterring intrusive media coverage. Despite the court's concession that "[i]ntensely personal or intimate revelations might not, in a given case, be considered newsworthy,"[267] the court merely paid lip service to this concept.[268] This is reflected by the court's resolution of the factual scenario presented in

262. *Id.* at 486.
263. *Id.* at 478.
264. *See supra* Part II.B-C.
265. *See supra* Part II.E.
266. *See* Shulman v. Group W Productions, 955 P.2d 469, 485-86 (Cal. 1998).
267. *Id.* at 486.
268. *Id.* at 502 (Brown, J. dissenting).

Shulman: it would be hard to imagine another situation more deserving of privacy protection than the treatment of an accident victim receiving medical attention within the supposed secured confines of an ambulance.[269] What legitimate interest could the public truly have in seeing and hearing the recently parapalegecized Mrs. Shulman crying out in pain and expressing her desire to die?[270] However, the court's blind adherence to the logical relationship test justified a ruling as a matter of law that no reasonable jury could conclude that this intrusive and shameful media coverage was not newsworthy.[271]

Privacy rights require greater protection than the logical relevance test is capable of providing. If the plaintiff in *Shulman* did not suffer an actionable invasion of privacy, it would be hard to imagine a situation where someone else would. Although the plurality approach did not expressly destroy the public disclosure of private facts tort, it eliminated much of the bite that it once had.[272] As a result, media abuses and ever-increasing penetrations into the private sphere are likely to increase. Unless the ad hoc balancing test is brought back, personal privacy rights will be increasingly trammeled over in the name of free speech rights.

This viewpoint was espoused by Justice Brown's dissent in *Shulman*:

> After paying lip service to this court's well-established, scholarly precedents, the plurality proceeds to ignore their test for assessing newsworthiness. Worse yet, the new test adopted in the plurality opinion seriously compromises personal privacy by rendering otherwise private facts newsworthy whenever they bear a "logical

269. *Id.* at 475-76.

270. This view was echoed in Justice Brown's dissent where she stated:

> [a]rguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers. . . . A jury could reasonably believe that fundamental respect for human dignity requires the patients' [sic] anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others.

Id. at 503-04 (Brown, J. dissenting).

271. *Id.* at 488.

272. *See supra* Part II.B-E.

> relationship" to a matter of legitimate public concern, even in situations where the news media obtains the private facts by deceptive and unlawful means.[273]

According to Justice Brown, if the Court had applied an ad hoc balancing approach, as *stare decisis* required, proper consideration could have been given to the depth of the publication's intrusion into ostensibly private affairs, rather than sacrificing individual privacy rights in favor of the public's interest in road accidents.[274] Justice Brown concluded by expressing her position that she saw "no reason to abandon our traditional [ad hoc balancing] newsworthiness test which has produced consistent and predictable results over the course of nearly three decades . . . ."[275]

3. *Because the Public Disclosure of Private Facts Tort Is Especially Fact Specific, Summary Judgment Should Seldom Be Granted*

Although summary judgment had been used with increasing frequency by California courts analyzing public disclosure of private facts claims prior to *Shulman*,[276] virtually every case in this area of the law is likely to be disposed of on summary judgment motions if courts follow the plurality's approach. Whereas courts once used a balancing approach to determine whether summary judgment should be granted[277] courts following *Shulman* must grant summary judgment if there is some minimal relationship between the facts disclosed and the event giving rise to the publication.[278]

The California Supreme Court stated: "[b]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. Therefore summary judgment is a favored remedy [in such cases]."[279] The court added, "'[t]o any suggestion that the outer bounds of liability should be left to a jury to decide we

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273. Shulman v. Group W Productions, 955 P.2d 469, 502 (Cal. 1998) (Brown, J., dissenting).

274. *Id.* at 502-05.

275. *Id.* at 504 .

276. *See supra* Part II.B-C.

277. *See supra* Part II.B-C.

278. *Shulman*, 455 P.2d at 484-86.

279. *Id.* at 487 (quoting Good Gov't Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 672, (Cal. 1978)).

reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on judicial control of the jury.'"[280] Thus, it appears that very few privacy cases will even reach the jury if courts follow the *Shulman* approach.

Although this comment acknowledges the importance of protecting free speech rights, it argues that the First Amendment should yield to the competing interest of privacy rights in certain circumstances.[281] Sometimes, when sufficiently important societal values are in conflict with free speech, the government is allowed to regulate speech.[282] This principle is best reflected by constitutional jurisprudence in the area of obscenity law.[283] By analogy, the public interest in protecting privacy rights is sufficiently great so as to justify the subordination of intrusive speech that gives unwarranted publicity to embarrassing details of people's private lives. Asking juries to strike the proper balance between individual privacy rights and free press is not inconsistent with the First Amendment, as juries have long assessed obscenity questions.[284] If juries can be entrusted to evaluate obscenity cases where criminal sanctions are involved,[285] certainly juries are capable of determining when disclosure of private facts warrants the imposition of civil damages.

The public disclosure of private facts tort is premised on assessing when the press has overstepped its bounds and violated societal standards of decency.[286] California courts have long held that a publication of private facts will not be actionable unless it "would be offensive and objectionable to the reasonable person and [would] not [be] of legitimate public concern."[287] Careful examination of the facts presented

280. *Id.* (quoting Haynes v. Knopf, 8 F.3d 1222, 1234 (7th Cir. 1993)).

281. *See infra* Part V.

282. *See generally* Central Hudson v. Public Service Commission of New York, 447 U.S. 557 (1980); FCC v. Pacifica, 438 U.S. 726 (1978); Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

283. *See generally* Miller v. California, 413 U.S. 15 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Jacobellis v. Ohio, 378 U.S. 184 (1964); Breard v. Alexandria, 341 U.S. 622 (1951).

284. *See supra* note 268.

285. *See supra* note 268.

286. *See supra* Part II.A.-E.

287. Shulman v. Group W Productions, 955 P.2d 469, 478 (Cal. 1998) (quoting Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 768 (Cal. Ct. App.

in each case and a consideration of the totality of the circumstances is needed to make this determination. Thus, juries who represent the conscience of the community are in the best position to evaluate these matters.[288] A strong judicial preference for summary judgment in public disclosure of private facts cases prevents juries from sending a message to media defendants that they are abusing the First Amendment. If judges are encouraged to exonerate media defendants in these cases, through the use of an overly-deferential logical relationship test, media abuses will continue to grow in both frequency and severity. The best way to ensure that the media is not allowed to abuse privacy rights is to allow the jury to decide these difficult cases.[289]

V. PROPOSAL

This comment proposes that courts return to the use of an ad hoc balancing test in lieu of the bright line "logical relationship test" advocated by the *Shulman* plurality.[290] An ad hoc balancing approach to the public disclosure of private facts tort allows courts to strike a balance between the competing rights of individual privacy and freedom of the press.[291] However, the *Shulman* approach fails to take adequate account for individual privacy rights and is overly deferential to the press.[292] Thus, in order to harmonize the important constitutional rights in these cases, courts should consider the totality of the circumstances and give careful scrutiny to the facts implicated in each case.

Courts should look closely at the following factors when evaluating the newsworthiness of a publication. First, courts should consider the subject matter giving rise to the

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1983).

288. *See generally* Jacobson v. United States, 503 U.S. 540 (1992); Thompson v. Oklahoma, 487 U.S. 815 (1988); Roth v. United States, 354 U.S. 476 (1957).

289. Although an argument could be made that citizens disgruntled with current media tactics could try to pass a law limiting the press's ability to publish private facts, such an option is not feasible. Media lobbyists wield a great deal of leverage over Sacramento politics. Moreover, any attempt to pass such a bill would be treated by the press as a witch-hunt. Every night the media would play spin-doctor and publish editorials claiming that the First Amendment was being dictatorially and unconstitutionally censored. Thus, relying on legislation to be passed may not be a feasible option.

290. *See supra* Part II.E.

291. *See supra* Part II.A-E.

292. *See supra* Part IV.B.1-2.

publication. Does it relate to the operations of government or the administration of government? If not, does the publication pertain to an issue that is relevant to the exercise of democratic rights or touch upon an issue of general societal concern?

Second, courts should consider whether the plaintiff is a public or private figure. To make this determination, courts should look at the plaintiff's occupation, position in society, and connection to a newsworthy event. True public figures should not receive as great of protection as involuntary or limited purpose public figures. Nonetheless, not all aspects of a public figure's private life should be published with impunity.

Third, courts should consider what facts were disclosed about the individual. If the disclosed facts were of a highly personal nature,[293] courts should ask whether it was necessary to disclose that information. For example, in the *Shulman* case, was it really necessary for the broadcasters to announce her name, show her face, and replay the statements she made while in the ambulance? If the facts are not of an extremely personal nature, then the necessity inquiry is not as important.

Fourth, courts should consider whether the facts disclosed contribute anything of value to society. If the facts merely add shock appeal, then this should weigh in favor of tort liability. However, if the facts truly contribute something to society, the press should be allowed more leeway.

Finally, courts should consider the social policies implicated in each case. Courts should ask the questions: 1) would liability under these circumstances unduly restrain the press and 2) would failure to impose liability discourage other people from contributing their talents or skills to society for fear that their lives would be exposed to the world?[294] Thus,

293. One possible way to put some teeth back into the public disclosure tort, while at the same time comporting with the First Amendment, would be to place the burden of proof on the newsworthiness issue on media defendants when their publications disclose arguably private facts about a plaintiff. This way, the First Amendment can be used as a shield rather than a sword. When the facts disclosed are less personally intrusive, the plaintiff should retain the burden of proving that the publication was not newsworthy.

294. For example, would a woman think twice about rescuing a baby off the train tracks, if the press would later run a story that she is a recovering drug addict and a reformed prostitute? If so, then the press has overstepped its

only after a careful and thorough balancing of all of these factors should decisions regarding liability for public disclosure of private facts be rendered.

This comment also proposes that summary judgment should not be a preferred method of disposing of public disclosure of private facts cases. Because liability is based upon a finding that a publication is not newsworthy and highly offensive to a reasonable person, juries should decide these cases.[295] The jury, as the voice of the community is in the best position to reflect changing societal values.[296] Allowing judges to rule as a matter of law prevents the people from sending a message to overzealous journalists.[297]

VI. CONCLUSION

The public disclosure of private facts tort forces courts to strike a difficult balance between the First Amendment's guarantee of freedom of the press and the interest of the states in protecting the privacy of individuals.[298] Courts have generally given broad protection to media defendants under the First Amendment to the detriment of individual privacy rights.[299] This comment traced the evolution of the judicial treatment of this issue in California and revealed that there is a movement away from ad hoc balancing toward a bright

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bounds. What is newsworthy is that this woman rescued a baby, not that she has had personal problems in her life.

295. In both *Briscoe* and *Diaz* the courts held that the jury was the proper finder of fact in the area of public disclosure of private facts because they were in the best position to evaluate the legality of the publications.

296. The majority of jurisdictions consider newsworthiness a question of fact to be decided by the jury. *See, e.g.*, Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983). A privacy plaintiff faces a real challenge in trying to win a public disclosure tort case because of the "broad treatment that most courts give the First Amendment defense. This allows defendants to prevail easily on summary judgment motions, and therefore to escape jury scrutiny." Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 197 (1979).

297. Obviously much is at stake when First Amendment rights are involved and there are concerns that juries will punish the expression of unpopular ideas through the imposition of tort liability. However, this argument underestimates the ability of jurors to follow the judge's instruction and ignores the fact that there are remedial devices such as judgment notwithstanding the verdict, motions for a new trial, and appeals that can prevent an overzealous jury from erroneously abusing the First Amendment.

298. *See supra* Part II.A-E.

299. *See supra* Part II.B-E.

line test.[300] In addition, this comment demonstrated that judges have frequently resolved these cases as matter of law.[301]

Courts should not abandon their ad hoc balancing approaches in favor of bright line tests. The use of an ad hoc balancing test to determine the newsworthiness of a publication is essential in order to strike the proper balance between these competing constitutional rights.[302] This comment proposed a set of factors for consideration when determining whether a publication is truly newsworthy or not.[303] It also proposed that summary should not be a preferred procedure in these cases because this is an especially fact specific area of the law that requires juries to evaluate publications in light of contemporary community values.[304] Such an approach would not unconstitutionally chill free speech, but would instead allow the community to determine for itself when a publication has impermissibly invaded the private sphere.[305]

Given the expanding technology of the day, and the growing morbid and sensational appetite of the press, we as individuals need greater protection from an irresponsible press that often publishes with a callous disregard for the rights of individuals. The legal community must prepare to meet the demands of an evolving society. Change is needed in this area of the law as overly broad interpretations of the First Amendment should no longer be relied upon as justification for the diminution of individual privacy rights.

Peter Gielniak

300. *See supra* Part II.B-E.
301. *See supra* Part II.B-E.
302. *See supra* Part V.
303. *See supra* Part V.
304. *See supra* Part V.
305. *See supra* Part V.